

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 22, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP544-CR**

**Cir. Ct. No. 2013CF4236**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL ANDREW RAMOS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Milwaukee County: CLARE L. FIORENZA and DANIEL L. KONKOL, Judges.  
*Affirmed.*

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Michael Andrew Ramos appeals from a judgment of conviction for one count of delivering more than three but fewer than ten grams of heroin, as a party to a crime and as a repeater, contrary to WIS. STAT. §§ 961.41(1)(d)2., 961.48(1)(b), and 939.05 (2013-14).<sup>1</sup> Ramos also appeals from an order denying his postconviction motion, which sought dismissal of his conviction based on his allegation that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing information about the resolution of a key witness’s criminal case in another county. We affirm the judgment and order.

## BACKGROUND

¶2 Ramos and his co-defendant, Josiah Grimes, were charged with multiple drug-related felonies. One set of charges related to controlled drug sales to a male confidential informant (“the CI”) in Milwaukee County in August 2013, while the second set of charges related to drugs recovered from a home in Milwaukee County after a search warrant was executed. The allegation against Ramos involving the CI was that Ramos drove a vehicle from which Grimes conducted a drug transaction with the CI. Ramos and Grimes were tried together in January 2015.

¶3 At trial, the CI was the first witness. On cross-examination, Grimes’s trial counsel asked the CI questions about his decision to cooperate with authorities and participate in the controlled drug sales. The CI acknowledged that

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

in exchange for his cooperation he had received consideration: Milwaukee County had not charged him with possessing heroin that had been recovered from his home. Grimes's trial counsel asked the CI whether he had received "any other benefits or consideration from [his] cooperation in this case," and the CI said he had not. Grimes's trial counsel next asked whether the CI's cooperation in this case was "discussed with the Waukesha District Attorney" in another case against the CI. The State objected, the trial court excused the jury, and the parties proceeded to discuss a Waukesha County criminal case where the CI pled guilty and was sentenced in August 2014.

¶4 During the discussion, the CI indicated that it had not been his understanding that he would receive consideration in the Waukesha case for his cooperation in the cases against Ramos and Grimes in Milwaukee, but he also acknowledged that when he was sentenced, both the State and trial counsel mentioned his cooperation. The parties did not have a copy of the sentencing transcript, so they did not know precisely what was said at that hearing. Ultimately, the trial court said that it would allow Grimes's trial counsel to ask a specific question when the jury returned: "[W]as your cooperation in this case ... mentioned to the sentencing judge by the Waukesha County District Attorney in your Waukesha case that you recently resolved?" The CI replied: "Yes."

¶5 Later, on redirect examination, the State asked the CI whether he had signed a written cooperation agreement in Waukesha County like the agreement he signed in Milwaukee County. The CI said he had not signed such an agreement and indicated that the Waukesha County District Attorney's Office had not made any promises to him based on his cooperation in Milwaukee County.

¶6 The next afternoon, Grimes’s trial counsel told the trial court that he had just procured a copy of the sentencing transcript and that it supported his belief that the CI had received credit in his Waukesha County case for his cooperation in the cases against Ramos and Grimes. He pointed out that the State had “changed [its] sentencing recommendation because of [the CI’s] cooperation.” Both defense attorneys moved for a mistrial on grounds that the prosecutor had committed a *Brady* violation by not disclosing that she spoke with the CI’s defense counsel concerning the Waukesha County case<sup>2</sup> and by not following up after the CI’s sentencing to determine if there was exculpatory information that needed to be disclosed.

¶7 The trial court concluded that a mistrial would not be appropriate. It found that the prosecutor was not aware that the CI had received consideration at his Waukesha County sentencing until Grimes’s counsel provided the sentencing transcript. However, the trial court said that because it was clear from the transcript that the Waukesha County trial court had considered the CI’s cooperation, the jury should be made “aware of all consideration provided to [the] confidential informant for testifying at trial.”

¶8 The parties subsequently drafted a stipulation that the trial court read to the jury. It included excerpts of the transcript from the sentencing hearing where the State said that it had decided to recommend probation, rather than incarceration, based on the CI’s “significant cooperation with the Milwaukee County authorities.” The jury also heard that the Waukesha County trial court told

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<sup>2</sup> The prosecutor said that she spoke with the CI’s trial counsel “very early on” in the case and not around the time of the CI’s sentencing.

the CI: “The fact that you were willing to, hopefully, remove that [drug dealer] from society is a big factor here.”

¶9 The jury found Ramos guilty of delivering heroin to the CI as a party to the crime, but it acquitted him of charges that he possessed more than fifty grams of heroin with intent to deliver and maintained a drug trafficking place.<sup>3</sup> Ramos was sentenced to five years of initial confinement and three years of extended supervision, consecutive to a revocation sentence he was already serving.

¶10 Ramos filed a postconviction motion seeking dismissal of his conviction on grounds that the State committed a *Brady* violation when it failed to disclose exculpatory information about the Waukesha case.<sup>4</sup> The trial court denied the motion in a written order, without holding an evidentiary hearing, after concluding that “additional detail of the consideration [the CI] received in Waukesha County is not material.”<sup>5</sup> This appeal follows.

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<sup>3</sup> In contrast, the jury found Grimes guilty of all six felonies with which he was charged.

<sup>4</sup> Ramos’s postconviction motion did not allege that the parties were unaware of the Waukesha County case prior to trial. Indeed, the record indicates that as early as March 2014 Grimes’s trial counsel told the trial court about his efforts to secure copies of arrest reports from the Waukesha case.

We also note that the fact section of Ramos’s postconviction motion discussed another alleged *Brady* violation concerning the lack of a police report about an unsuccessful attempt to set up a drug buy using the CI. Although the motion did not provide argument concerning that alleged violation, the trial court chose to address it and denied Ramos relief. On appeal, Ramos once again mentions that alleged violation but presents no argument on it. We conclude that Ramos has not pursued any issues related to that alleged *Brady* violation and, therefore, we will not discuss it. See *Reiman Assoc., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (Issues not briefed are deemed abandoned.).

<sup>5</sup> The Honorable Clare L. Fiorenza presided over the trial and sentenced Ramos. The Honorable Daniel L. Konkol decided the postconviction motion after the case was assigned to him due to judicial rotation.

## LEGAL STANDARDS

¶11 Pursuant to *Brady* and its progeny, the State must disclose evidence that is favorable to an accused, and the failure to do so violates due process. *See State v. Harris*, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737; *see also* WIS. STAT. § 971.23(1)(h) (The State is required to disclose “[a]ny exculpatory evidence” to the defense.). “Evidence is favorable to an accused, when, ‘if disclosed and used effectively, it may make the difference between conviction and acquittal.’” *Harris*, 272 Wis. 2d 80, ¶12 (citation omitted). A defendant has the burden to establish a violation of the State’s obligations under *Brady*. *See Harris*, 272 Wis. 2d 80, ¶13.

¶12 To establish a *Brady* violation, a defendant must show that the State withheld evidence that is not only favorable to him but also material to the case. *See Harris*, 272 Wis. 2d 80, ¶13. “‘The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *Id.*, ¶14 (citation and one set of quotation marks omitted). On appeal, we review *de novo* whether the undisputed facts establish a *Brady* violation. *See State v. Rockette*, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269.

¶13 As noted, Ramos’s postconviction motion alleging a *Brady* violation was denied without an evidentiary hearing. Our supreme court has summarized the applicable legal standards used in such cases:

Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The [trial] court must hold an evidentiary hearing if the defendant’s motion raises such facts. However, if the motion does not raise facts sufficient

to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

*State v. Burton*, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

## DISCUSSION

¶14 Ramos alleges that “[e]vidence of the concessions that [the CI] received in his Waukesha case was clearly exculpatory evidence which should have been turned over to the [defense].” He further asserts:

[T]he fact that the evidence was not discovered by the defense until mid-trial prejudiced the defense. This impacted trial strategy and negatively impacted Mr. Ramos’[s] ability to prepare and present a complete defense to the charges. In addition, this deprived Mr. Ramos of a fair trial. As the [trial] court even stated, had the defense had this information they could have “impeached the heck out of [the CI] when he was on the stand.” As it turns out, Ramos lost his opportunity to fully cross-examine [the CI] with respect to the proceedings [the CI] was part of in Waukesha County. If the evidence had been appropriately turned over, Ramos would have been able to fully prepare for cross-examination and perhaps investigate further [the CI’s] Waukesha County proceedings. Ramos’[s] ability to discredit [the CI], an important trial strategy, was limited, if not nullified, by the ***Brady*** violation.

(Record citation omitted; bolding and italics added.)

¶15 Even if we assume for purposes of this opinion that the State withheld exculpatory evidence, Ramos’s claim fails. As the trial court noted in its decision: “The only asserted relevance of this evidence is that it impeaches [the CI’s] motives for acting as a confidential informant and testifying against Grimes and [Ramos].” The jury ultimately heard evidence about the CI’s cooperation agreement with Milwaukee County and his sentencing in Waukesha. The

attorneys were allowed to ask the CI whether he had been promised consideration in Waukesha for his cooperation in Milwaukee and whether the Waukesha County trial court was told about that cooperation. Later, after the sentencing transcript was produced, the jury heard a stipulation that included statements from the State and the Waukesha County trial court indicating that the CI's sentence was positively impacted by his cooperation in Milwaukee. As the trial court stated in its order, the facts the jury heard "made it exceedingly clear to the jury that [the CI's] cooperation with the police investigation and testimony at trial was motivated by his own self-interest." This evidence provided a basis for the defense to argue in closing—as Grimes's trial counsel explicitly did—that the consideration the CI received in both Milwaukee County and Waukesha County provided an incentive for him to lie about whether Grimes actually sold him drugs.

¶16 Ramos's postconviction motion and appellate briefs do not acknowledge the stipulation that was read to the jury. Instead, they simply assert that the State's lack of disclosures concerning the Waukesha County case impacted Ramos's trial strategy, without explaining what his trial strategy was or how precisely it was affected. Ramos also complains that he "lost his opportunity to fully cross-examine" the CI, but there is no indication that Ramos sought to recall the CI as a witness. Further, Ramos has not explained what he would have asked the CI that was not already addressed by the CI's testimony and the stipulation concerning the Waukesha sentencing that was read to the jury.

¶17 We conclude that Ramos was not entitled to an evidentiary hearing on his postconviction motion and that the trial court did not erroneously exercise its discretion when it denied the motion without a hearing. *See Burton*, 349 Wis. 2d 1, ¶38. The motion presents only conclusory allegations and does not demonstrate "a reasonable probability" that if details about the CI's Waukesha



County sentencing had been disclosed to the defense prior to trial, “the result of the proceeding would have been different.” See *Harris*, 272 Wis. 2d 80, ¶14 (citation omitted). For these reasons, we affirm the judgment and order.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.